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Supreme Court of the United States

October Term, 1998

GREAT LAKES DREDGE & DOCK COMPANY,

Cross-Petitioner,

-v-

JOHN D. SHADE,

Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the ship's work requirement for seaman status, applied universally in the decisions of this Court, most recently in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) and incorporated as the first prong of a two prong test for seaman status in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), is determined at the time of the maritime employee's injury or over the entire course of the employee's discrete job assignment, that is, does the first prong of the seaman status test include a temporal component?

2. When a maritime employee's duties on a discrete job assignment fluctuate between ship's work and land-based work, can the maritime employee qualify for seaman status when injured while performing land-based work?

3. Whether the first prong of the seaman status test is satisfied if the maritime employee's work contributes to the accomplishment of the overall *job* rather than the accomplishment of the mission of a specific *vessel* or group of vessels on that job?

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF CORPORATE CROSS-PETITIONER

The parent company of Cross-petitioner, Great Lakes Dredge & Dock Company is Great Lakes Dredge & Dock Corporation, a Delaware corporation.

Nonwholly owned subsidiaries of Great Lakes Dredge & Dock Company are North American Trailing Company, NATCO Limited Partnership and Amboy Aggregates Joint Venture.

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OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit dated September 3, 1998, the Order of the Third Circuit denying rehearing dated September 30, 1998 and the Order of United States District Court for the Eastern District of Pennsylvania denying Great Lakes' post-trial Motion for Judgment as a Matter of Law, and Alternative Motion for a New Trial dated November 29, 1997 are reproduced in the Appendix of the opening Petition for a Writ of Certiorari filed by John D. Shade, October Term, 1998, No. 98-1063. The judgment of the Third Circuit Court of Appeals dated September 3, 1998 was omitted from the Appendix of the opening Petition of Shade and is reproduced in the Appendix hereto at 1a. The Opinion of the Third Circuit Court of Appeals is reported at 154 F.3d 143 (3d Cir. 1998).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Third Circuit was entered on September 3, 1998. The order of the Third Circuit denying rehearing was entered on September 30, 1998. Cross-petitioner expressly relies on Supreme Court rule 12.5. The opening Petition for a Writ of Certiorari filed by John D. Shade, Petitioner, October Term, 1998, No. 98-1063 was docketed on December 31, 1998.

STATUTES INVOLVED

Both the Jones Act, 46 U.S.C. App. §688(a) and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§902(3)(G) and 905(a) are involved in this case. These statutory provisions are set forth below.

46 U.S.C. App. §688
Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

*****

33 U.S.C. §902(3)(G):
Definitions

When used in this Act --

. . . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor- worker including a ship repairman, ship-builder, and ship-breaker, but such term does not include --

. . . .

(G) a master or member of a crew of any vessel; . . .

33 U.S.C. §905:
Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the

injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4 [33 U.S.C. § 904].

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner, Great Lakes Dredge & Dock Company ("Great Lakes"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 3, 1998, because the temporal component to the ship's work holding in the opinion of the Third Circuit directly conflicts with this Court's decisions in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) as well as decisions of the Second, Fifth and Ninth Circuit Courts of Appeals on the important issue of seaman status presented herein.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction of this case pursuant to 28 U.S.C. §1331.

Great Lakes is a corporation engaged in, *inter alia*, dredging operations, including beach replenishment projects at coastal locations throughout the United States. In 1994, the United States Army Corp of Engineers awarded Great Lakes a contract for beach replenishment in Cape May, New Jersey. Great Lakes does not employ a regular work force to perform dredging contracts awarded to it. Rather, Great Lakes enters into collective bargaining agreements with various unions and obtains necessary manpower through these unions. For the Cape May job, Great Lakes obtained manpower from Local 25, Marine Division, International Union of Operating Engineers, AFL-CIO ("Local 25") pursuant to a written collective bargaining agreement which covered the period October 1, 1992 to September 30, 1996.

Great Lakes began the Cape May job on November 12, 1994. The materials and equipment necessary to perform the Cape May job came from two other Great Lakes' beach replenishment jobs on the East Coast of the United States that were being completed at Ocean City, Maryland and Ocean City, New Jersey. Most of the materials and equipment were transported to Cape May by sea and included the Dredge LONG ISLAND, a SCOT's Buoy, tugs, an anchor barge, several thousand feet of submersible pipeline and several thousand feet of pipeline to be used on the shore. When submersible pipeline

and shore pipeline are dismantled from a job site and prepared for movement to another location, the process is known as demobilization of the job. When such pipeline is moved to a new job site and installed, the process is known as mobilization of the job. John D. Shade ("Shade") did not participate in the demobilization of the Great Lakes' jobs in Ocean City, Maryland and Ocean City, New Jersey. Likewise, Shade did not participate in the mobilization of the Great Lakes' job in Cape May. By the time Shade was dispatched by Local 25 to the Cape May job site, the mobilization of the Cape May job had been completed including the placement of the SCOT's Buoy and the installation of approximately 6,600 feet of submersible pipeline. Further, the Dredge LONG ISLAND was on site and had begun dredging from a pre-determined area at the bottom of the Atlantic Ocean off the coast of Cape May.

Shade's dispatch to the Cape May job was necessitated by a provision in the Collective Bargaining Agreement between Great Lakes and Local 25 which mandated that, at minimum, an assistant foreman and a shoreman be employed on the beach when a shore pipeline is in use. Since a shore pipeline was in use on the Cape May job, Great Lakes was required to comply with this provision of the Collective Bargaining Agreement. Following a discussion between Great Lakes' superintendent and the Local 25 shop steward, it was agreed that sufficient shoremen to cover three shifts would be requested from the Union hiring hall and dispatched to the job. Shade was one of these shoremen.

When Shade first appeared on the job site, he could not perform the assignments of a shoreman on the beach because a

large hole was detected in the submersible pipeline shortly after the Dredge LONG ISLAND began pumping its first load to the shore through the SCOT's Buoy and submersible pipeline. A work party was assembled to remove the broken section of submersible pipeline and replace it. Shade was included in this work party and was assigned to Anchor Barge 110, a vessel without means of self-propulsion which contained an A-frame derrick and hoisting winch. Anchor Barge 110 was propelled by a tug. Upon completion of the repair to the submersible pipeline, Shade was assigned to perform the tasks of a shoreman on the beach. At all times the Dredge LONG ISLAND was dredging and pumping sand to the beach, Shade did not dispute that he was performing the tasks of a shoreman on the beach. When the Dredge LONG ISLAND was not able to dredge and pump because of adverse weather conditions, there was a factual dispute whether Shade was performing the tasks of a shoreman on the beach or other tasks that required him to work on the water in the protected harbor of Cape May. It was not disputed that for five days prior to and at the time of his accident, the Dredge LONG ISLAND was dredging and pumping and Shade was performing the tasks of a shoreman.

Although there were vessels other than Anchor Barge 110 working on the Cape May job, including the Dredge LONG ISLAND and tugs, Shade was not assigned to any of the other vessels at any time and performed no work aboard the other vessels at any time. The only vessel to which Shade was assigned and on which he performed work was Anchor Barge

110.

Although Shade pled a cause of action based on unseaworthiness, he did not pursue the unseaworthiness claim at trial because no condition of a vessel or its appurtenances caused his injuries.

When Shade injured his right thumb on December 30, 1994, he was helping the assistant shore foreman to refuel a welding machine being used on the beach. The refueling required the welding machine to be transported from its location on the beach to the fuel tank at another location on the beach. Shade and his foreman were in the process of suspending the welding machine by cable from the fork of a front end loader for transport to the fuel tank when the injury occurred. At the time of Shade's injury, Anchor Barge 110 was out of service and had been out of service for nearly two weeks. As to the relationship of Shade's work activities at the time of his injury to Anchor Barge 110 or any other Great Lakes' vessel on the job, the uncontradicted testimony of his foreman, Mark Oldham, who testified for Shade at the trial, was succinct as follows:

> Q. And what you were doing had nothing do to with the anchor barge, is that correct?
>
> A. That's correct. . .
>
> Q. It had nothing to do with any vessel on the job, did it?

A. Not on that day, no.

Because of the uncontested fact that Shade's work activities at the time of injury had no connection to any vessel in navigation and, therefore, could not be considered ship's work by any reasonable person, Great Lakes moved for summary judgment prior to trial. The motion was denied by the district court. At the close of Shade's evidence, Great Lakes moved for judgment as a matter of law under Fed.R.Civ.P. 50(a). The district court deferred ruling on the motion. At the conclusion of all the evidence, Great Lakes renewed its Rule 50(a) motion. Again, the district court deferred ruling on the motion and submitted the case to the jury. After the jury returned a verdict in favor of Shade and judgment was entered on that verdict, Great Lakes renewed its Rule 50 motion which was denied by the district court. On appeal to the Third Circuit Court of Appeals, the district court's denial of Great Lakes' motion for judgment as a matter of law was affirmed by the Third Circuit. Notwithstanding that Shade was not performing ship's work at the time he was injured, the Third Circuit held that Shade was entitled to a jury determination regarding his compliance with the ship's work or first prong of the seaman status test set forth in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) and explicated in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). In so holding, the Third Circuit applied two principles that are in direct conflict with the seaman status decisions of this Court and the decisions of the Courts of Appeals for the Second, Fifth and Ninth Circuits. Those two principles are:

1. A temporal component applies to the ship's work prong of the seaman status test rather than a snapshot at the time of injury.

2. The ship's work prong of the seaman status test does not require a maritime employee's work at the time of injury to contribute to the function or mission of a vessel in navigation. Rather, it is sufficient if that maritime employee's work contributes to the purpose or mission of the overall job.

These two errant principles are the keystones of this Cross-Petition of Great Lakes.

As to Great Lakes' alternate motion for a new trial, the Third Circuit reversed the judgment entered in the district court and granted Great Lakes a new trial predicated on the improper admission into evidence of Shade's employments with Great Lakes and others prior to the Cape May job. That evidentiary ruling is the subject of Shade's opening Petition for a Writ of Certiorari in No. 98-1063.

ARGUMENT FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

The holding of the Third Circuit Court of Appeals that a temporal component exists in the ship's work prong of the seaman status test is in direct conflict with *Wilander* and *Gizoni* and every other seaman status decision of this Court pre-dating them including, *inter alia, Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952) ("The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the *activity in which he was engaged at the time of injury*."), cited with approval in *Wilander*. 498 U.S. at 356 (emphasis added). Further, the Third Circuit's temporal component holding is directly in conflict with decisions of the Second, Fifth and Ninth Circuits. The Third Circuit's implying a temporal component in the ship's work prong of the seaman status test resulted from the Third Circuit's failure to comprehend the context of *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1955), in that the dicta in *Chandris* on which the Third Circuit relied to imply a temporal component in the ship's work test did not address the ship's work test but the substantiality test adopted by *Chandris*.

Engrafting a temporal component onto the ship's work test emasculates *Wilander* as well as the reassignment of duties doctrine enunciated in *Chandris* in that a temporal component engrafted onto *Wilander* enables a maritime employee to acquire seaman status on the basis of ship's work performed prior or subsequent to assignment to land-based work.

The ship's work test requires the maritime employee's work at the time of injury contributes to the function of the vessel to which he or she is assigned or to the accomplishment of that *vessel's* mission. It is not germane to the ship's work test that the maritime employee's work at the time of injury contributes to the accomplishment of the *job*. The Third Circuit's substitution of job's work for ship's work directly conflicts with *Wilander* and its progeny.

ARGUMENT

I. THERE IS NO TEMPORAL COMPONENT TO THE SHIP'S WORK TEST FOR SEAMAN STATUS. THE TEST IS APPLIED AT THE TIME OF INJURY.

In support of its holding that the ship's work prong of the seaman status test includes a temporal component, the Third Circuit erred in two respects: (a) failing to comprehend the context and limiting nature of *Chandris* and (b) following an aberrant line of decisions from the Fifth Circuit Court of Appeals beginning with *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 432-33 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978).

Since the Jones Act was passed in 1920, every decision of this Court defining "seaman" within the meaning of that act

has held that a maritime employee must be performing ship's work *at the time of injury* to qualify as a seaman. *E.g. Warner v. Goltra*, 293 U.S. 155 (1934); *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). In fact, until *Wilander*, some lower courts interpreted this Court's decisions to require not only the performance of ship's work at the time of injury but specific ship's work in the nature of aiding the navigation of the vessel. *Wilander* eliminated the aid in navigation requirement. In all of this Court's decisions, the determination of seaman status was made at the moment of injury and the relevant inquiry was whether the maritime employees' work activities at the time of injury were the work of a vessel in navigation. *See, e.g., Norton v. Warner Co.*, 321 U.S. 565 (1944) (citing with approval, *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (5th Cir. 1938)). *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129 (1959) is not to the contrary. It holds that ingressing or egressing a vessel to begin performing or at the conclusion of performing ship's work is within the ambit of ship's work thereby qualifying the maritime employee for seaman status for injuries sustained during ingress to and egress from a vessel. 361 U.S. at 132 (see especially concurring and dissenting opinion, 361 U.S. at 133-137).

Wilander reviewed this Court's and the various courts of appeals' seaman status decisions under the Jones Act and held that a maritime employee must have an employment-related connection to a vessel in navigation to qualify for seaman status and that a necessary element of that connection is that the maritime employee be performing ship's work. 498 U.S. at 355. At the conclusion of *Wilander*, this Court stated that the question of seaman status is a "mixed question of law and fact."

498 U.S. at 356. In recognizing that the test is fact specific, this Court instructed the lower federal courts to focus on "the nature of the vessel and the employee's precise relation to it." *Id.* In so doing, this Court cited with approval *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190 (1952) as follows:

> "The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the *activity in which he was engaged at the time of injury*.'"

Id. (emphasis added). It is abundantly clear that this Court established a snapshot approach for the ship's work test and that snapshot is taken at the time of injury. There is nothing in *Wilander* remotely suggesting a temporal component to the ship's work test.

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991) was decided shortly after *Wilander* and involved a ship repairman injured while performing work aboard a vessel in navigation. This Court recognized the hybrid nature of the work of a ship repairman. At times, a ship repairman performs his work aboard vessels in navigation. At other times, that same ship repairman performs his work on land, not in the service of any vessel in navigation. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979) ("30%-35% of ship repair work is done on land.") *Gizoni* holds that a ship repairman injured

while working on a vessel in navigation, is eligible for seaman status. At the same time, citing *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (ship repairmen working and injured on land), the *Gizoni* Court observed that a ship repairman injured while performing work assignments on land not in the service of a vessel are not eligible for seaman status. 502 U.S. at 89. For a maritime employee with hybrid work assignments on vessels and on land, *Gizoni* makes it clear that eligibility for seaman status depends on whether the employee was injured while performing ship's work. Contrary to the Third Circuit's holding here, there is no suggestion in *Gizoni* of the existence of a temporal component to the ship's work prong of the seaman status test. Rather, *Gizoni* quoted from and reiterated *Wilander* that:

> The key to seaman status is employment-related connection to a vessel in navigation .... It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

502 U.S. at 88.

The conclusion of the Third Circuit that dicta in *Chandris* implies a temporal component to the ship's work test is in error. Just as the Ninth Circuit Court of Appeals' reading of *Chandris* was flawed in *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd.*, 520 U.S. 548 (1997), so too is the Third Circuit's reading of *Chandris* flawed here.

Chandris is not an explication of *Wilander*. It is a limitation and qualification of *Wilander*. In *Chandris*, the parties stipulated that the maritime employee was injured while performing ship's work aboard a vessel during a voyage. 515 U.S. at 352. The maritime employee argued that his compliance with the ship's work test during a voyage of a vessel, *ipso facto*, established his seaman status. Throughout *Chandris*, the ship's work test is referred to as the "voyage" test since the maritime employee was injured performing ship's work on a vessel during a voyage. Justice Stevens with whom Justices Thomas and Breyer concurred, would have adopted the voyage test without more for establishing seaman status. 515 U.S. at 377 (concurring opinion) ("In my judgment, an employee of the ship who is injured at sea in the course of his employment is always a 'seaman'"). The majority of this Court, however, held that a second substantiality test also must be met before a maritime employee can qualify for seaman status. *Chandris* must be read in the context of this Court explaining why the voyage test or ship's work test alone is insufficient to qualify a maritime employee for seaman status. Here, the Third Circuit read *Chandris* as *broadening* the ship's work test and *expanding* it beyond the time of injury by implying a temporal component. On the contrary, *Chandris* was not required to consider, much less expand, the ship's work test because of the parties' stipulation that Latsis was performing ship's work at the time of his injury. Rather, *Chandris limited* the ship's work test by qualifying it. Under *Chandris*, not only must the maritime employee be performing ship's work at the time of injury, that employee also must have a substantial connection to the vessel or fleet of vessels in the service of which he was injured, both in terms of nature and time.

It was in the context of explaining why the voyage test alone is insufficient for seaman status that *Chandris* employed the snapshot analogy and the other dicta on which the Third Circuit relied. The snapshot referred to in *Chandris* is the employment at the time of the injury, that is, the voyage. This Court rejected a test which focuses only on the employment at the time of injury, that is, the voyage (snapshot) and held that an additional substantiality test has to be met. *Chandris* does not hold, suggest or imply that the time of injury snapshot for the ship's work test under *Wilander* and *Gizoni* has been eliminated in favor of a temporal component. In misinterpreting the snapshot analogy in *Chandris*, the Third Circuit missed the dichotomy: a snapshot is used for the ship's work or first prong of the seaman status test but is not used for the substantiality or second prong of the test.

Chandris was not intended to lessen the standard of eligibility for seaman status. Rather, it was intended to heighten that standard by requiring compliance with a substantiality test in addition to the ship's work test. By including a temporal component in the ship's work test, the Third Circuit has lessened the standard by effectively eliminating the ship's work test. In so doing, the Third Circuit rendered meaningless the reassignment of duties doctrine articulated in *Chandris* as follows:

> When a maritime worker's basic assignment changes, his seaman status may change as well. . . For example, we can imagine situations in which someone who had worked for years in an

> employer's shore-side headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, *just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea.*

515 U.S. at 372 (citation and quotation omitted) (emphasis added).

By including a temporal component in the ship's work test, the Third Circuit failed to understand the hybrid nature of the work assignments of maritime employees engaged on coastal beach replenishment jobs. On a discrete beach replenishment job, a maritime employee may be required to perform multiple work assignments, some of which are connected to a vessel in navigation and expose the maritime employee to "the special hazards and disadvantages to which they who go down to sea in ships are subjected", *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting), others of which are land-based with no connection

to a vessel in navigation and expose the maritime employee to no such hazards and disadvantages. When Shade was working aboard Anchor Barge 110 at sea and performing the work of that vessel, he was eligible for seaman status subject to the substantiality test set forth in *Chandris*. Conversely, when Shade was assigned to work ashore unconnected to any vessel in navigation, he was not eligible for seaman status. The effect of the Third Circuit decision is to enable a maritime employee to obtain eligibility for seaman status on the basis of prior service at sea, contrary to the mandate of *Chandris* and the holdings of *Wilander* and *Gizoni*. Such a lessening of the standard for seaman status is directly contrary to these decisions.

Likewise, the Third Circuit's reliance on an aberrant line of cases from the Fifth Circuit was misplaced. That line of cases began with *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978). Citing *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129 (1959) as authority, the Fifth Circuit in *Higginbotham* held:

> Moreover, once it is established that the claimant is a seaman, the Jones Act permits recovery even if he sues for injuries received while off ship and engaged in temporary work for his employer unrelated to service of the ship.

545 F.2d at 432. In misreading *Braen*, the Fifth Circuit in *Higginbotham* failed to understand the distinction between land-based work and ship's work performed on land. *Braen* involved a maritime employee injured on land while egressing a vessel at the conclusion of performing ship's work. As stated at page 15 *supra*, *Braen* holds that such egress is included in ship's work. In that regard, *Braen* represents the outer limit of the holding first espoused in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943) that a maritime employee does not lose seaman status merely because the ship's work is being performed on land. Accordingly, *Higginbotham* and its progeny, *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048 (5th Cir. 1988); *Smith v. Odom Offshore Surveys, Inc.*, 791 F.2d 411 (5th Cir. 1986); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243 n.5 (5th Cir. 1983); *Savoie v. Otto Candies, Inc.*, 692 F.2d 363 (5th Cir. 1982); *Guidry v. South Lousiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980), derived from a misreading of *Braen* and were of questionable authority prior to *Wilander*. Their continued viability was put to rest when they were overruled by *Wilander* which unquestionably requires that the maritime employee be performing work in the service of a vessel at the time of injury to be eligible for seaman status. It is significant that, apart from the Third Circuit, no other Circuit Court of Appeals has relied on *Higginbotham* and its progeny since this Court's decision in *Wilander*. In fact, the Fifth Circuit itself now realizes that *Higginbotham* and its progeny are inapposite. In *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998), the Fifth Circuit recognized that:

> In *Chandris*, the Supreme Court makes it clear that the adequacy of the plaintiff's connection to a vessel is properly *assessed on the basis of his work assignment at the time of his injury* . . . At the time of his injury, Manuel was assigned to work aboard a vessel in navigation.

135 F.3d at 352 (quotation and citation omitted) (emphasis added).

Likewise, all of the other Courts of Appeals that have addressed the seaman status issue since *Wilander* have held unanimously that the maritime employee must be performing ship's work at the time of injury to be eligible for seaman status. In *Fisher v. Nichols*, 81 F.3d 319 (2d Cir. 1996) the Second Circuit stated:

> Two recent Supreme Court cases have, however, attempted to clarify the standard for Jones Act seaman status. . . The rule that emerges has essentially two components. The first component examines the plaintiff's employment *at the time of the injury* and requires that the 'employee's duties. . . contribut[e] to the function of

> the vessel or to the accomplishment of its mission.

81 F.3d at 322 (emphasis added). In *Heise v. The Fishing Co. of Alaska,* 79 F.3d 903 (9th Cir. 1996), the Ninth Circuit observed:

> Thus, at the time of Heise's injury, his connection to the Alaska Ranger was to be limited to the time that the vessel was in Seward undergoing maintenance and repairs. The fact that if Heise performed well he might be hired to work on the ship when it left Seward if there were jobs available does not change his land-based status *at the time the injury occurred.*

79 F.3d at 906-07 (emphasis added). Subsequently, in *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997), the Ninth Circuit stated the issue before it as follows:

> Whether Cabral was a seaman *when he slipped and fell on Barge 538's gangway* is a mixed question of law and fact.

128 F.3d at 1291 (emphasis added).

A Writ of Certiorari should issue to bring the Third Circuit's seaman status jurisprudence in harmony with the decisions of this Court and the Courts of Appeals for the Second, Fifth and Ninth Circuits.

II. ELIGIBILITY FOR SEAMAN STATUS REQUIRES THE MARITIME EMPLOYEE'S WORK CONTRIBUTE TO THE FUNCTION OR MISSION OF A VESSEL.

In holding that Shade is entitled to a jury determination of the ship's work prong of the seaman status test, the Third Circuit stated with respect to Shade's shore-based work at the time of his injury:

> Additionally, even Shade's duties on the beach were not unrelated to the work of a vessel in navigation; instead, they contributed to the purpose of the dredging operation.

Shade v. Great Lakes Dredge & Dock Co., 154 F.3d 143, 150 (3d Cir. 1998). The quoted statement represents a significant deviation from the ship's work test articulated in *Wilander*. The test is not whether the maritime employee's duties at the time of injury contribute to the accomplishment of the overall job. Rather, the duties at the time of the injury must contribute to the function or mission of the vessel on which the maritime employee claims to be a member of the crew. The Third Circuit deviation is significant because the performance of a beach

replenishment job involves multiple duties, some of which contribute to the function or mission of a vessel and all of which contribute to the accomplishment of the overall job. Only the former will give eligibility for seaman status to a maritime employee.

A Writ of Certiorari should issue to bring the Third Circuit in harmony with the decisions of this Court.

CONCLUSION

From 1920 to 1958, this Court addressed the seaman status issue under the Jones Act on multiple occasions with the result that:

> "Our wayward case law has led the lower courts to a `myriad of standards and lack of uniformity in administering the elements of seaman status.'"

Wilander, 498 U.S. at 353 (citing *Engerrand & Bale*, 24 S. Tex. L.J., at 494). Further,

> "Diderot may very well have had the Supreme Court cases in mind when he wrote, `We have made a labyrinth and got lost in it. We must find our way out.'"

Id. (citing *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984).

Beginning with *Wilander*, this Court has revisited the seaman status issue a remarkable four times in a six year period. This frequency alone is testimony to the importance of the federal question involved. Beginning with *Wilander*, this Court has formulated a two prong test for seaman's status which is intended to be the road map out of the seaman status labyrinth. *Wilander* established the first prong of the test, the ship's work requirement at the time of injury, and *Gizoni* further defined that test. *Chandris* established the second or substantiality prong of the test and *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) further clarified the parameters of the substantiality test. Together, these four decisions establish a clear and workable framework to guide the lower courts in seaman status cases. None of this Court's recent or prior decisions implies a temporal component to the ship's work prong of the test. Nonetheless, the Third Circuit Court of Appeals read *Chandris* to imply a temporal component to the ship's work test. To the contrary, the Second, Fifth and Ninth Circuits, properly reading *Wilander* and *Chandris*, have held that the ship's work test is determined at the time of injury not over the entire course of the job.

The Third Circuit below also addressed the substantiality prong of the seaman status test and properly held that the factfinder is not to consider prior discrete employments with others or with the same employer in determining substantiality. In his opening Petition at No. 98-1063, Cross-respondent here, Shade, requests a Writ of Certiorari to review the Third Circuit's substantiality holding. In the event this

Court grants a Writ of Certiorari as requested by Shade in No. 98-1063, Cross-petitioner herein respectfully requests that a second Writ of Certiorari issue and that this Court affirm the Third Circuit's substantiality holding in No. 98-1063 and reverse the Third Circuit's ship's work holding herein with instructions that judgment as a matter of law be entered in favor of Great Lakes. It is important to grant the Writ of Certiorari herein to bring the Third Circuit into harmony with decisions of this Court and decisions of the Second, Fifth and Ninth Circuit Courts of Appeals and to use this Court's supervisory power to prevent the creation of another seaman status labyrinth.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-2023

JOHN D. SHADE

v.

GREAT LAKES DREDGE & DOCK COMPANY,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C Civ. No. 97-00739)

Present: Greenberg, Scirica and McKee, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on July 30, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court entered November 19, 1997, be, and the same is hereby reversed and the cause is remanded to the District Court for a new trial in a matter [sic] consistent with this opinion. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

S/ P. Douglas Sisk
Clerk

Dated: 3 September 1998